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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 777.

THE FIRST NATIONAL BANK IN PLANT CITY, Plant City, Florida,
Petitioner,

v.

FRED O. DICKINSON, JR., Comptroller of the State of Florida, et al.

No. 932.

WILLIAM B. CAMP, Comptroller of the Currency,
Petitioner,

v.

FRED O. DICKINSON, JR., Comptroller of the State of Florida, et al.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

## MOTION FOR LEAVE TO FILE A BRIEF FOR THE FIRST NATIONAL BANK OF GAINESVILLE, GEORGIA, ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

The following state and national banks in Georgia and North Carolina hereby respectfully move for leave to file a brief as Amici Curiae in the above-entitled cases in support of Respondents:

The First National Bank of Gainesville
Gainesville, Georgia 30501

Gainesville National Bank
Gainesville, Georgia 30501

The Union County Bank of Blairsville
Blairsville, Georgia

Fannin County Bank of Blue Ridge
Blue Ridge, Georgia

Habersham Bank of Clarksville
Clarksville, Georgia

Bank of Clayton
Clayton, Georgia

The Peoples Bank of Cleveland
Cleveland, Georgia

Northeastern Banking Company of Commerce
Commerce, Georgia

Cornelia Bank
Cornelia, Georgia

Bank of Dahlonega
Dahlonega, Georgia

The Bank of Hiawassee
Hiawassee, Georgia

The Bank of Toccoa
Toccoa, Georgia

The Citizens Bank of Toccoa
Toccoa, Georgia

The Bank of Franklin
Franklin, North Carolina

The interests of Amici and their reasons for requesting leave to file a brief are set forth in the attached brief.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES.

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THE FIRST NATIONAL BANK IN PLANT CITY, Plant City, Florida,
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WILLIAM B. CAMP, Comptroller of the Currency,
Petitioner,

v.

FRED O. DICKINSON, JR., Comptroller of the State of Florida, et al.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

## BRIEF ON BEHALF OF THE FIRST NATIONAL BANK OF GAINESVILLE, GEORGIA, ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

### INTEREST OF AMICI CURIAE.

The First National Bank of Gainesville, Georgia, et al. (all named in the preceding motion for leave to file this brief) are fourteen national and state banks engaged in banking in Northeast Georgia and an adjacent portion of North Carolina.

As a result of and relying directly on paragraph 7490, the Comptroller's Manual for National Banks, and the

Florida District Court's judgment in the instant case, the First National Bank of Cornelia, Georgia began operation of a "bank messenger service" throughout Northeast Georgia and an adjacent portion of North Carolina in direct competition with amici banks and in violation, amici banks assert, of federal and Georgia banking statutes.

This situation resulted in litigation in Georgia similar to the instant Florida case in which amici banks appeared as plaintiff-intervenors in **Jackson v. First National Bank of Cornelia, Ga.**, 292 F. Supp. 156 (N. D. Ga., 1968). The Georgia case, after judgment for plaintiffs, was appealed to the Fifth Circuit, and further appellate proceedings have been stayed pending the decision of the Supreme Court in the instant Florida case.

In the Georgia case amici banks have plainly and strongly insisted that the administrative regulation promulgated by the Comptroller of the Currency and referred to as 7490 is illegal as being without statutory foundation in the National Bank Act.

The purpose of this amici curiae brief is to treat this one issue in as concise a manner as is possible.

## PROPOSITION STATED.

The "administrative authorization" granted by the Federal Comptroller to national banks by Paragraph 7490, **the Comptroller's Manual for National Banks**, with respect to "messenger service" contravenes the federal statute, and is, therefore, an illegal "administrative authorization."

## ARGUMENT.

Paragraph 7490 of the Comptroller's Manual for National Banks (A., p. 381) which authorizes national banks to "provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank" is an illegal "administrative authorization" in that there is no statutory basis for it in the National Bank Act, 12 U. S. C. 21, et seq.

Statutory authority for the issuance of this authorization can be looked for and allegedly discovered in only two sources—(a) as an "incidental" activity "necessary to carry on the business of banking" pursuant to 24 U. S. C. 24 (Seventh), or (b) as a branch bank pursuant to 12 U. S. C. 36.

Petitioners contend that the messenger service activity authorized by 7490 does not constitute branch banking; therefore, petitioners must necessarily contend that the statutory basis for the authorization is in 24 (Seventh) as an implied or incidental power necessary to carry on the business of banking.

It is highly significant that 7490 permits a national bank to provide messenger service only ". . . **pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than the bank**". This requirement is made for obvious purposes—if the messenger is admittedly the agent of the bank, his activity constitutes branch banking, and 7490 was designed to circumvent this pitfall.

By such circumvention, however, 7490 is left without a statutory foundation. A national bank cannot engage in the business of furnishing bank-paid employees (the messengers) and bank-owned equipment (the armored

cars) to others to act as the agent of others. Such furnishing of messengers and trucks to others becomes a chauffeured rent-a-truck operation which, we assert, is not an implied power of banking under 24 (Seventh).

"The extent of powers of national banks is to be measured by the terms of the federal statutes relating to such associations, and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established." **First National Bank v. Missouri**, 263 U. S. 640 at 656.

There is no **express** statutory authority for a national bank to furnish its personnel and its equipment to act as agents for others; likewise, the furnishing of such personnel and equipment to others cannot and should not be interpreted to be an incidental power under 24 (Seventh) and the decided cases construing that statute.

Therefore, if our assertion is correct, that the complained of activity permitted by 7490 is not an implied power of banking, then 7490 is an administrative regulation that has been illegally promulgated by the Comptroller of the Currency.

"Administrative determinations must have a basis in law and must be within the granted authority." **Social Security Board v. Nierotko**, 327 U. S. 358 at 369.

In **Bank of Cornelia**, supra, amici curiae banks here strenuously asserted that if the messenger is the agent of the bank, it amounts to proscribed branch banking in Georgia; and if the messenger is **not** the agent of the bank, then the bank is engaged in an activity not incidental to the business of banking and which is proscribed by 24 (Seventh).

The messenger service here contested has its basis in 7490, but if 7490 has no statutory basis, then both the Regulation and the messenger service it permits, having been placed under judicial scrutiny, collapse.

"An agency may not finally decide the limits of its statutory power. That is a judicial function." **Social Security Board v. Nierotko**, supra.

## CONCLUSION.

Paragraph 7490 of the Comptroller's Manual goes beyond the permissible limits of administrative interpretation.

We urge that the judgment of the Fifth Circuit Court of Appeals be affirmed in this case.

Respectfully submitted,

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**Certificate of Service.**

I hereby certify that a copy of the foregoing Motion for Leave to file an Amici Curiae Brief and of the foregoing Amici Curiae Brief has been furnished by United States mail this 19th day of June, 1969 to:

Robert S. Edwards, Post Office Box 1119, Plant City, Florida, Attorney for The First National Bank in Plant City;

V. Carroll Webb, State Capitol, Tallahassee, Florida, Attorney for Fred O. Dickinson, Jr., Comptroller of Banking of the State of Florida;

Wm. Reece Smith, Jr., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Post Office Box 3239, Tampa, Florida 33601, Attorney for The Hillsboro Bank, et al.;

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